Oral argument requested

No. 05-18-00941-CR

In the Fifth Court of Appeals of Texas

Anthony Rashad George

Appellant

vs.

The State of Texas

Appellee

Appeal from the 282nd Judicial District Court of
Dallas County, Cause No. F16-76714-S

Appellant's Brief

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Trial judge:

The Honorable Amber Givens-Davis
The 282nd Judicial District Court of Dallas County

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Statement of the Case

On March 23, 2017, the State of Texas filed an indictment returned by a Dallas County grand jury charging George with capital murder. CR: 18; *see* Tex. Pen. Code § 19.03(a)(2). George pleaded not guilty, and after several pre-trial hearings, the State began presenting its case on July 24, 2018. RR7: 243. The State rested three days later, and the defense then unsuccessfully moved for a directed verdict. RR10: 217-18.

The State indeed failed to show that George was guilty of anything more than robbery, however, and so the defense then rested too, asking the court to instruct the jury on that lesser-included offense. RR10: 227, 241. But the court denied the request. RR10: 232. And after the State then argued in closing that "[i]t is absolute[ly] foreseeable that any robbery is gonna result in murder," and that "[t]he evidence is clear to assume that one person couldn't have [murdered the victim]," the jury found George guilty. RR10: 285, 290, 295. Automatically sentenced to life without parole (*see* Tex. Pen. Code § 12.31(a)(2)), George immediately filed notice of appeal. CR: 159.

Issues Presented

1. Whether the evidence was legally insufficient to show that George murdered the victim or that George should have anticipated that his accomplice in robbing the victim would murder the victim.
2. Whether the trial court reversibly erred by denying George's request to include the lesser-included offense of robbery in the jury charge.
3. Whether the trial court erred in denying George's motion for a mistrial after the State argued in closing that "[i]t is absolute[ly] foreseeable that any robbery is gonna result in murder."
4. Whether the trial court reversibly erred by overruling George's objection to the State's closing-argument claim that "[t]he evidence is clear to assume that one person couldn't have done this."
5. Whether the judgment should be reformed to correct several errors.

Statement of Facts

On three separate occasions on November 27, 2016, Brian Sample paid prostitutes Jessica Ontiveros and Rachel Burden to come to his Dallas hotel room. RR9: 101, 107, 115, 118-19. Sample had been holed

up there for days, high on cocaine, methamphetamine, and GHB. RR8: 68, 212; RR9: 181.

In between their visits, Ontiveros and Burden told George—their boyfriend and pimp, respectively (RR8: 204-10; RR9: 86-92)—that Sample had a great deal of cash and would be an easy robbery target. RR8: 243; RR9: 165. Hotel surveillance video shows that shortly before 3:00 p.m., George and another man, Rodney Range, entered Sample's hotel. RR10: 83-85. Approximately 17 minutes later, George and Range left. RR8: 83; RR10: 87. Hotel staff later discovered Sample's beaten-to-death body on his bed. RR7: 279.

George, Range, Ontiveros, and Burden were all charged with capital murder. RR8: 175, 263; RR9: 10, 162; *see State v. Range*, F17-75020. But the only witness to what occurred in Sample's room was Ontiveros—she was still there on her third visit. RR8: 213. She testified that after Range and George entered the room, Sample ran towards them. RR8: 217-18. Range then put Sample into a chokehold and fought him over to the bed. RR8: 218. After Sample was subdued, Range bound him with zip-ties and began "tossing" the room for things to steal. RR8:218, 248. George, all the while, was "just standing there"—trying to calm

Ontiveros and telling her she could not yet leave. RR8: 218, 221-22, 242-43, 291.

Summary of Arguments

Argument One

There's certainly sufficient evidence George was involved in a conspiracy to rob Sample. But there was insufficient evidence George intentionally or knowingly caused Sample's death or should have anticipated that Range would murder Sample. Ontiveros—the only other person in Sample's hotel room at the time of the robbery—testified that George "just [stood] there" while Range and Sample fought. RR8: 217-18, 221-22, 242-43. The State, it seems, mistakenly believed that "[i]t is absolute[ly] foreseeable that any robbery is gonna result in murder." RR10: 285.

Argument Two

The trial court reversibly erred by denying George's request to include robbery in the jury charge. Robbery is a lesser-included offense of capital murder as charged here, and, as set out in Argument One, robbery's all the evidence supported. And because the erroneous charge left

the jury with no option but to convict George of criminal homicide or acquit him, a finding of harm is essentially automatic.

Argument Three

The trial court erred in denying George's motion for a mistrial after the State argued in closing that "[i]t is absolute[ly] foreseeable that any robbery is gonna result in murder." The State's misconduct was severe: it was a clear misstatement of law absolving the State of its burden of showing that George should have anticipated the possibility of murder occurring during the course of the robbery. And the State didn't abandon it after the court sustained George's objection. The State merely tweaked it to: "It's absolutely foreseeable this is what's going to happen when you put what you want above everybody else." Finally, this wasn't just a close case—as set out in Argument One, the evidence was altogether insufficient. But the State's flagrantly improper argument provided the jury with a path to a capital-murder conviction.

Argument Four

The trial court reversibly erred in overruling George's objection to the State's closing-argument claim that "[t]he evidence is clear to as-

sume that one person couldn't have done this." In reality, medical examiner Dr. Beth Frost testified that she had no idea whether Sample's injuries were caused by more than one person. And again, the misconduct was severe: in claiming that two people must have murdered George, the State plainly implied that George intentionally or knowingly caused Sample's death—a proposition for which the State had scant evidence, as explained in Argument One. As to this improper argument, there were no measures adopted to cure the misconduct—the trial court overruled George's objection. And again, the State's improper argument provided the jury with a path to a capital-murder conviction where the evidence was insufficient.

Argument Five

Finally, the judgment should be reformed to correct several errors. Contrary to the judgment, (1) George was found guilty of capital murder in the course of committing or attempting to commit robbery; (2) George's attorneys were Scottie Allen, Lysette Rios, and Eric Reed; and (3) George's sentence was not assessed by the jury.

Argument One

> The evidence was legally insufficient to show that George murdered the victim or that George should have anticipated that his accomplice in robbing the victim would murder the victim.

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1. Even a strong suspicion of guilt is not legally sufficient evidence of guilt.

At George's trial, the State presented evidence that George and Rodney Range robbed Brian Sample. For George to be guilty of capital murder, however, the State also had to show that (1) he intentionally or knowingly caused Sample's death in the course of robbing him (*see* Tex. Pen. Code § 19.03), or (2) in an attempt to carry out a conspiracy to commit robbery, Range murdered Sample, and the murder was committed in furtherance of the robbery, and was one that George should have anticipated as a result of the carrying out of the conspiracy. *See* Tex. Pen. Code § 7.02(b); CR: 10.

The jury found that, under one of these two theories, George was guilty. CR: 151-52, 157. But this Court is required to act as a "due process safeguard," ensuring that no one is convicted of a crime except

upon proof of the elements of the offense beyond a reasonable doubt. *Allen v. State*, 249 S.W.3d 680, 704 (Tex. App.—Austin 2008, no pet.) (citing *Gollihar v. State*, 46 S.W.3d 243, 245–46 (Tex. Crim. App. 2001)). This Court must engage in a rigorous review of the sufficiency of the evidence and determine whether, viewing the evidence in the light most favorable to the verdict, the jury was rationally justified in finding George guilty beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 906, 912 (Tex. Crim. App. 2010); *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979); *Garcia v. State*, 367 S.W.3d 683, 686 (Tex. Crim. App. 2012). Just as "beyond a reasonable doubt" is the "high[est] burden of proof in any trial, criminal or civil," "there is no higher standard of appellate review than the standard mandated by *Jackson* [*v. Virginia*]." *Brooks*, 323 S.W.3d at 917 (Cochran, J., concurring). In short, even a "strong suspicion of guilt does not equate with legally sufficient evidence of guilt." *Winfrey v. State*, 393 S.W.3d 763, 769 (Tex. Crim. App. 2013).

2. The State did not present evidence that George intentionally or knowingly caused Sample's death or should have anticipated that Range would murder Sample.

As noted above, the State presented evidence to support that George and Range robbed Sample. Jessica Ontiveros and Rachel Burden both testified to as much, and hotel surveillance video supports their testimony. And following the robbery, George fled to Las Vegas. RR8: 226; RR9: 129.

Sample's murder is a different story. As to the responsible party or parties, the State presented two pieces of evidence, both from George's prostitute accomplices. First, Burden testified that after the robbery, George had blood on his face. RR9: 125-26. Second, Ontiveros—the only other person in Sample's hotel room at the time of the robbery—testified that Sample attacked George and Range when they entered the hotel room, and that Range then fought with Sample. RR8: 217-18. George was "just standing there" trying to calm her down and telling her she could not leave. RR8: 218, 221-22, 242-43, 291.

Taken together, this evidence does not support that George intentionally or knowingly caused Sample's death or that George should have anticipated that Range would murder Sample. As to the former, only the blood on George's face could possibly support that he intentionally

or knowingly caused Sample's death. But Burden offered no further details about the supposed blood mark—the amount, its precise location on George's face, etc. RR9: 125-26. And Burden's credibility was highly suspect to begin with: she admitted to lying under oath at a pre-trial hearing (RR9: 152), and on the day of Sample's murder, she was high on cocaine. RR9: 179, 181. Certainly, a blood mark on George's face *could* mean that George caused Sample's death; but it could also just mean that he was in the room at the time of Sample's death. And "[a] conclusion reached by speculation"—by "mere theorizing or guessing about the possible meaning of facts and evidence presented"—"is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007); *see also Hall v. State*, 86 S.W.3d 235 (Tex. App.—Austin 2002, pet. ref'd) (requiring more than mere conjecture or speculation). And when considering Ontiveros's testimony, the only possible theory of guilt indeed would seem to be that George should have anticipated that Range would murder Sample.

Here too though the State's evidence allows only for speculation. That George was "just standing there" as Range killed Sample *could*

suggest that George in fact anticipated Range's actions; but again, even "a strong suspicion of guilt does not equate with legally sufficient evidence of guilt." *Winfrey*, 393 S.W.3d at 769. And remember that, per Ontiveros (one of the State's star witnesses), it was Sample who initiated the physical conflict. RR8: 217-18.

The State's flawed theory of George's guilt is best demonstrated by the State's closing argument: that "[i]t is absolute[ly] foreseeable that *any* robbery is gonna result in murder." RR10: 285 (emphasis added). Indeed, this is what the State really seemed to believe. But it's not true. If "a defendant knew his co-conspirators might use guns in the course of the robbery," for example, that "can be sufficient to demonstrate that the defendant should have anticipated the possibility of murder occurring during the course of the robbery." *Canfield v. State*, 429 S.W.3d 54, 69–70 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (collecting cases holding similarly). But that George entered into a conspiracy to commit robbery cannot itself support his capital murder conviction as a co-conspirator—there must be some additional evidence showing that he should have anticipated the robbery would result in murder. *See Tippitt v. State*, 41 S.W.3d 316, 326 (Tex. App.—Fort Worth 2001) ("We do not

believe robbery is an offense of such a violent nature that murder should always be anticipated as a potential risk of its commission, and we have found no case that suggests otherwise."), *overruled on other grounds by Hooper*, 214 S.W.3d 9 (rejecting *Tippitt*'s application of inference-stacking doctrine); *see also* RR10: 285 (sustaining objection to the State's closing argument).

This case is similar to *Tippitt*. There, the defendant and an accomplice planned to rob a drug dealer. *Id.* at 319. During the course of the robbery, the accomplice pulled out a gun and murdered the dealer. *Id.* at 320. The defendant was convicted of capital murder under the theory of parties' liability. *Id.* at 319.

The Fort Worth Court of Appeals held that the evidence was legally insufficient to support a finding of criminal responsibility. *Id.* at 324. The court found that, though the evidence established that the murder was committed in furtherance of the robbery, the evidence failed to support a finding that the defendant should have anticipated the murder as a result of carrying out the robbery. *Id.* In particular, the court found that although there was some evidence that the accomplice,

by his reputation, might have been prone to violence, there was no evidence to establish the defendant's knowledge of the accomplice's violent propensities. *Id.* at 325–26. The court also noted that there was no evidence to show that the defendant knew the accomplice had a gun when he entered the victim's home. *Id.* The court reasoned that without such evidence, it could not hold that the evidence showed beyond a reasonable doubt that the defendant should have anticipated intentional murder as a possible result of their agreement to rob the victim. *Id.* at 326.

Here, like there, the State presented no evidence from which a rational juror could infer that George should have anticipated that Range would murder Sample. The State's only evidence—that George was calm while Range murdered Sample—allows only for speculation. And Burden testified that she anticipated only that Sample "was gonna get robbed." RR9: 163. "The intention was just to go up there and get money"—"[i]t was never for anybody to get hurt." RR9: 165

Juries are permitted to draw multiple reasonable inferences. *Hooper*, 214 S.W.3d at 16. But "juries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions." *Id.* Here, the State failed to present evidence from

which a rational juror could infer that George intentionally or knowingly caused Sample's death—again, the State showed only that George had some unknown amount of blood on his face—or that George should have anticipated that Range would murder Sample. George thus urges this Court that the evidence is insufficient to affirm his conviction and respectfully requests this court reverse his conviction and render a judgment of acquittal. *See Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004); *Greene v. Massey*, 437 U.S. 19 (1978) (re-trial not permissible after reviewing court has determined evidence is insufficient).

Argument Two

> The trial court reversibly erred by denying George's request to include the lesser-included offense of robbery in the jury charge.

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At the jury-charge conference, George asked that the lesser-included offense of robbery be included. RR10: 227. The State agreed that "aggravated robbery would be appropriate," but the court, reasoning that "it can't just be that… there's a lack of evidence of the greater offense," denied George's request altogether. RR10: 232. The court wasn't

moved by George's identification of Burden's testimony that "[robbery] was the only plan and agreement that they were supposed to do and it was to take the personal property from the decedent." RR10: 232.

This Court reviews the trial court's decision in two steps: first, this Court determines whether error exists; if so, this Court then evaluates whether sufficient harm resulted from the error to require reversal. *Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015) (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g)).

1. Even if there had been just a little evidence that George was guilty only of robbery, George would have been entitled to a robbery charge instruction.

Here, the first step of this Court's review itself has two prongs: a charge on a lesser-included offense should be given when (1) the lesser-included offense is included within the proof necessary to establish the offense charged; and (2) there is some evidence that would permit a rational jury to find that the defendant is guilty of the lesser offense but not guilty of the greater. *Salinas v. State*, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005). As to the first prong, robbery is unquestionably a

lesser-included offense of capital murder as charged here. *See, e.g., Gongora v. State*, AP-74,636, 2006 WL 234987, at *6 (Tex. Crim. App. Feb. 1, 2006); *Turner v. State*, 01-08-00657-CR, 2010 WL 3062013, at *6 (Tex. App.—Houston [1st Dist.] July 30, 2010, no pet.). Thus, the only question as to the first step is the second prong: whether there was some evidence from which a rational jury could acquit George of capital murder while convicting him of robbery. *Salinas*, 163 S.W.3d at 741.

As to that question, the evidence must be evaluated in the context of the entire record, and this Court may not consider whether the evidence is credible, controverted, or in conflict with other evidence. *Moore v. State*, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998). Anything more than a scintilla of evidence may be sufficient to entitle a defendant to a jury instruction on a lesser-included offense. *Hall*, 225 S.W.3d at 536 (citing *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994)). In short, "*[a]ny* evidence that the defendant is guilty only of the lesser-included offense is sufficient to entitle the defendant to a jury charge on the lesser-included offense." *Id.* (emphasis added).

As explained in the previous ground, there was ample evidence that George was guilty only of robbery. Indeed, that's all the evidence

showed—the evidence was legally insufficient to support George's conviction for capital murder. Most notably, though, Ontiveros testified that while Range murdered Sample, George was "just standing there" trying to calm her down and telling her she could not leave. RR8: 218, 221-22, 242-43, 291. And as defense counsel noted in requesting the lesser-included-offense instruction, Burden testified that she only thought Sample "was gonna get robbed." RR9: 163. "The intention was just to go up there and get money"—"[i]t was never for anybody to get hurt." RR9: 165. George thus urges this Court that the first and second prongs of the first step are satisfied. Robbery should have been included in the jury charge.

2. Because the charge left the jury with no option but to convict George of criminal homicide or acquit him, a finding of harm is essentially automatic.

As to the second step of the charge-error analysis, "[t]he erroneous refusal to give a requested instruction on a lesser-included offense is charge error subject to an *Almanza* harm analysis." *O'Brien v. State*, 89 S.W.3d 753, 756 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd) (citing *Saunders v. State*, 840 S.W.2d 390, 392 (Tex. Crim. App. 1992)); *see Almanza*, 686 S.W.2d at 171. Because George's jury-charge complaint was

preserved by an objection or request for instruction, reversal is thus required if George suffered "some harm." *Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013). "When the trial court's failure to submit the requested lesser-included-offense instruction has 'left the jury with the sole option either to convict the defendant of the greater offense or to acquit him,'" however, "a finding of harm is automatic." *Turner v. State*, 01-08-00657-CR, 2010 WL 3062013, at *8 (Tex. App.—Houston [1st Dist.] July 30, 2010, no pet.) (quoting *Saunders v. State*, 913 S.W.2d 564, 571 (Tex. Crim. App. 1995)); *see also Robalin v. State*, 224 S.W.3d 470, 477 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("When a trial court improperly refuses a requested instruction on a lesser-included offense, such that the jury is left with the sole option of either convicting the defendant or acquitting him, a finding of harm is essentially automatic."); *Brock v. State*, 295 S.W.3d 45, 49 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd) (stating same); *Ray v. State*, 106 S.W.3d 299, 302–03 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (stating same).

Here, the trial court did instruct the jury on other lesser-included offenses (murder and manslaughter). CR: 152-53. And in that circumstance, some harm isn't necessarily automatic. *Saunders*, 913 S.W.2d at

571-74. In *Saunders*, for example (a murder case), the trial court instructed the jury on the lesser-included offense of involuntary manslaughter but not negligent homicide. The Court of Criminal Appeals held that the jury's decision to find the defendant guilty of murder negated a finding of some harm, because even without a negligent-homicide instruction, the involuntary-manslaughter instruction gave the jury an opportunity to compromise between murder and acquittal—an opportunity the jury declined to embrace. *Id.*

The questionable reasoning of *Saunders* aside, this isn't *Saunders*. The disputed issue was not the degree of homicide of which George was guilty—it was whether George was not guilty of any criminal homicide, guilty only of robbery. Instructing the jury on the lesser-included offenses of murder and manslaughter thus did not provide for a compromise on that issue, as it did not give the jury the option of convicting on a charge that did not include as an element George's causation or anticipation of Sample's death. *See Turner*, 2010 WL 3062013 at *9 ("The jury was not offered the possibility of convicting on any charge that did not include as an element Turner's reasonable anticipation of a murder committed by Brown. Thus, although the trial court instructed the jury

on one lesser-included offense, on the facts of this case, felony murder was not a compromise in regard to the issue of anticipation."). "Some harm" is thus indeed automatic, and this Court should reverse George's conviction and remand for re-trial. *See id.* (holding capital-murder defendant harmed by lack of robbery instruction despite felony-murder instruction) (citing *Saunders*, 913 S.W.2d at 571); *Robalin*, 224 S.W.3d at 477.

Argument Three

> The trial court erred in denying George's motion for a mistrial after the State argued in closing that "[i]t is absolute[ly] foreseeable that any robbery is gonna result in murder."

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In the final closing argument before the jury retired to deliberate, the State claimed that "[i]t is absolute[ly] foreseeable that any robbery is gonna result in murder." RR10: 285. George understandably objected—this was "totally improper and…outside the record"—and the trial court rightly sustained the objection, instructing the jury to disregard the flagrantly improper argument. RR10: 285. But the court denied George's motion for a mistrial. RR10: 285.

In reviewing this decision, this Court should uphold the trial court's denial if it was within the zone of reasonable disagreement. *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007). "[T]he appropriate test for evaluating whether the trial court abused its discretion is a tailored version of the test originally set out in *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998), a harm-analysis case.[1] *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). This Court should consider (1) the severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks), (2) any curative measures (the efficacy of any cautionary instruction by the judge), and (3) the certainty of conviction absent the misconduct. *Id.* Only in extreme circumstances, where the prejudice is incurable, is a mistrial required. *Id.*

Here, as to the first factor, the degree of misconduct was severe. The State's argument—a clear misstatement of law (*see Tippitt*, 41 S.W.3d at 326)—absolved the State of its burden of showing that George should have anticipated the possibility of murder occurring during the

[1] In reviewing the trial court's denial of a motion for a mistrial, this Court should assume without deciding that the State's closing argument was improper. *See Hawkins*, 135 S.W.3d at 76-77.

course of the robbery. *See* Tex. Pen. Code § 7.02. And the State didn't abandon the flagrant misstatement after the court sustained George's objection. The State merely tweaked it to: "It's absolutely foreseeable this is what's going to happen when you put what you want above everybody else." RR10: 285.

As to the second factor (any curative measures), the trial court sustained defense counsel's objection and instructed the jury to disregard the improper comment. George recognizes that appellate courts generally presume that a jury will follow a trial court's instruction to disregard. *See Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009). But offensive or flagrant error mandates reversal even if a trial court gives an instruction to disregard. *Phillips v. State*, 130 S.W.3d 343, 356 (Tex. App.—Houston [14th Dist. 2004), *aff'd*, 193 S.W.3d 904 (Tex. Crim. App. 2006); *see also Williams v. State*, 417 S.W.3d 162, 176 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd). Accordingly, here, where the State's improper argument relieved the prosecution of its burden on a hotly contested issue, an instruction to disregard was an insufficient response.

Finally, the third factor (the certainty of conviction absent the misconduct) also supports that the trial court abused its discretion by denying a mistrial. As set out in Argument One, this wasn't just a close case—the evidence was altogether insufficient. But it was the State's flagrantly improper argument that provided the jury with a path to a capital-murder conviction.

All three factors weigh in favor of the conclusion that the trial court abused its discretion by denying George's motion for a mistrial. On this ground, too, George urges this Court to reverse his conviction and remand for retrial.

Argument Four

> The trial court reversibly erred in overruling George's objection to the State's closing-argument claim that "[t]he evidence is clear to assume that one person couldn't have done this."

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The State almost immediately followed its first improper argument with a second, claiming that "[t]he evidence is clear to assume that one person couldn't have done this." RR10: 289-90. (In reality, medical examiner Dr. Beth Frost testified that she had no idea whether

Sample's injuries were caused by more than one person. RR8: 189.) George again objected, this time to the "misstatement of the evidence." RR10: 290. But this time, the court overruled George's objection. RR10: 290.

In reviewing the trial court's ruling, this Court first determines whether the argument was improper. *Nickerson v. State*, 478 S.W.3d 744, 761 (Tex. App.—Houston [1st Dist.] 2015, no pet.). A trial court of course has broad discretion in controlling the scope of closing argument, and the State "enjoys wide latitude in drawing inferences from the evidence." *Id.* But a plain misstatement of the evidence during closing argument is simply impermissible. *See, e.g., Foster v. State*, AP-74901, 2006 WL 947681, *11 (Tex. Crim. App. 2006) ("...the State's jury argument is a deduction of the combined testimony of Gass and Patton, but was a misstatement of the record based on Detective McCaskill's testimony. Thus, the trial court erred when it overruled appellant's objection."); *Stephens v. State*, 05-08-01557-CR, 2010 WL 819049, *4 (Tex. App.—Dallas 2010, pet. ref'd) ("In this case, the prosecutor inserted an incorrect statement of fact. Thus, the trial court erred by overruling appellant's objection to the prosecutor's misstatement."); *Coggeshall v.*

State, 961 S.W.2d 639, 642 (Tex. App.—Fort Worth 1998, pet. ref'd) ("we find the trial court committed error in overruling appellant's second and last objection to the prosecutor's improper reference to a fact not in evidence."). The only question, then, is whether the improper argument affected George's substantial rights. *See* Tex. R. App. P. 44.2(b); *Brown v. State*, 270 S.W.3d 564, 573 (Tex. Crim. App. 2008).

As to that question, this Court should again consider (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the certainty of conviction absent the misconduct. *Gallo v. State*, 239 S.W.3d 757, 769 (Tex. Crim. App. 2007). And again, each factor weighs in favor of a finding of harm. First, the misconduct was again severe. In claiming that two people must have murdered George, the State plainly implied that George intentionally or knowingly caused Sample's death—a proposition for which the State had scant evidence, as explained in Argument One. Second, there were no measures adopted to cure the misconduct—the trial court overruled George's objection. RR10: 290. And third (and again), this wasn't merely a close

case—the evidence was insufficient. Here too though the State's improper argument provided the jury with a path to a capital-murder conviction.

The State's second improper argument warrants the same relief as its first. This Court should reverse George's conviction and remand for retrial.

Argument Five

The judgment should be reformed to correct several errors.

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The judgment in this case states that George was found guilty of capital murder in the course of committing or attempting to commit terroristic threat. CR: 140. We know, though, that George was found guilty of capital murder in the course of committing or attempting to commit robbery. CR: 151-52.

The judgment further states that George's attorney was Daniel Eckstein. CR: 140. In fact, George's attorneys were Scottie Allen, Lysette Rios, and Eric Reed.

Finally, the judgment states that the jury assessed George's life-without-parole sentence. CR: 140. But George's sentence was automatic. *See* Tex. Pen. Code § 12.31(a)(2).

If the record contains the necessary information to do so, this Court has the authority to modify incorrect trial-court judgments. Tex. R. App. P. 44.2(b); *Bigley v. State*, 865 S.W.2d 26, 27 (Tex. Crim. App. 1993); *Abron v. State*, 997 S.W.2d 281, 282 (Tex. App.—Dallas 1998, pet. ref'd). Accordingly, if this Court does not enter a judgment of acquittal, or does not reverse the district court's judgment and remand for re-trial, George respectfully requests that the judgment be modified.

Prayer

George respectfully requests this Court enter a judgment of acquittal. Alternatively, George respectfully requests this Court reverse his conviction and remand this case for re-trial. If nothing else, George respectfully requests this Court modify the judgment.

Respectfully submitted,

/s/ Robert N. Udashen
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Certificate of Service

I, the undersigned, hereby certify that a true and correct copy of the foregoing Appellant's Brief was electronically served to the Dallas County District Attorney's Office on February 22, 2019.

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Certificate of Compliance

Pursuant to Tex. R. App. P. 9.4(i)(3), undersigned counsel certifies that this brief complies with:

1. the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(B), because this brief contains 4,809 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1); and

2. the typeface requirements of Tex. R. App. P. 9.4(e), and the type style requirements of Tex. R. App. P. 9.4(e), because this brief has been prepared in Microsoft Word in 14-point Century Schoolbook, a proportionally spaced typeface.

/s/ Robert N. Udashen
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